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In The

Supreme Court of the United States

October Term, 1973

No. 73-1364

JOSEPH MANFREDI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

JOSEPH MANFREDI,

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UNITED STATES OF AMERICA,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT AND OPINION BELOW

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction (see Appendix A, 1a). Petitioner was indicted and convicted upon a single count for conspiracy to violate federal narcotics laws in the United States District Court for the Southern District of New York [26 U.S.C., Sections 4705(a), 7237(b); 21 U.S.C., Section 846]. Petitioner was sentenced on November 3, 1972, to a term of thirty (30) years imprisonment and a commited fine of

$25,000. Petitioner was convicted along with nine (9) other defendants, eight (8) of whom appealed and whose convictions were, likewise, affirmed in the Court of Appeals. Petitioner was remanded after the verdict and is presently serving his sentence as aforesaid.

The judgment of conviction against petitioner was affirmed by the Court of Appeals on November 23, 1973, and is reported in the advance sheets at 488 Fed. 2d 588 (issue dated Feb. 18, 1974). The opinion of the Court of Appeals is hereinafter set forth in Appendix C, 10a.

In the Court of Appeals, petitioner made application for a rehearing and rehearing *en banc* which was denied, without any opinion on February 6, 1974 (see Appendix B, 10a).

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(i).

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err by admitting into evidence wiretaps and related proof derived from court ordered electronic surveillance where the interceptions were in no way 'minimized'?

2. Did the Court of Appeals err in deciding that the remedy available to the defendants, where proper minimization has not been conducted, is limited to 'erasure' of irrelevant and non-criminal interceptions, and that all other interceptions tending to establish guilt are admissable at the trial?

3. Did the Court of Appeals err in finding legally sufficient a New York State wiretapping order which, contrary to the requirements of state law, completely omitted any expressed requirement for minimization?

4. Where a state wiretapping order is procured by state officers who failed to disclose that the taps are to be executed and monitored by federal officers having no direct accountability to the state issuing authority, is such wiretap order violative of the state statute requiring disclosure of the identity of the true applicant?

5. Did the trial court err in refusing to grant an adjournment to defer jury selection where, at the time of such motion, an enormous barrage of prejudicial publicity had occurred, which publicity was triggered by events not directly related to the facts of the case itself?

6. Was the evidence of petitioner's alleged membership in the conspiracy based entirely upon heresay statements made by other conspirators entirely between themselves in regard to which petitioner had no opportunity, under the Sixth Amendment, to conduct cross-examination?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

This case involves the applicability and interpretation of the Fourth, Fifth, and Sixth Amendments of the United States Constitution, 21 U.S.C., Sections 841, 846, 848; 26 U.S.C. Sections 4705(a) and 7237(b); 18 U.S.C., Sections 2518(5); [Title III of the Omnibus Crime Control and Safe Streets Act of 1968]; and New York Criminal Procedure Law, Sections 700.05 *et seq.*

STATEMENT OF THE CASE

Petitioner was indicted and convicted upon a single count for conspiracy to violate federal narcotics laws [26 U.S.C., Sections 4705(a), 7237(b); 21 U.S.C. Section 846]. The indictment set forth six other narcotics grounded crimes, none of which named petitioner as a defendant or otherwise. Of the seven counts originally charged, three of these (Nos. 4, 5 and 6) were severed, and count 7 was dismissed prior to the submission of the case to the jury. Nine defendants, including petitioner, were found guilty under the count (No. 1) alleging conspiracy to sell, distribute and possess narcotic drugs. Petitioner was sentenced to a term of thirty (30) years imprisonment as a second drug offender and a committed fine of $25,000. Petitioner was remanded after the verdict on September 19, 1972, and has been serving his sentence without interruption since that time.

The proofs at the trial purported to establish that petitioner and his nephew, Joseph LaCosa, were involved in a family narcotics business during the period from April, 1970 to April, 1972, when all the alleged participants in the conspiracy were arrested. Petitioner is claimed to have been the source of the illicit narcotics, although the proofs uniformly indicate that the individual regularly connected with the sale and distribution of the drugs was the defendant Joseph LaCosa aided and abetted by a string of relatives, both male and female, who assisted him in the movement of contraband and the collection of large amounts of money in payment therefore. Numbering among LaCosa's criminal associates were the following defendants: his father, Frank LaCosa; two cousins through marriage, Charles Cassarella and Timothy Schrader and three alleged customer-distributors, Vincent Yanni,

Anthony Coleangelo and Robert Mayo. With respect to Joseph LaCosa, the observation of his movements and dealings with undercover agents and informers left little doubt regarding his alleged complicity in the over-all scheme. Proof respecting LaCosa's father, his cousins, and various of his customers above-named was established through surveillance, interception of incriminating telephone calls, documentary proof relating to criminal transactions, address books and telephone records establishing the connection of the defendants to the conspiracy, and various statements of the defendants demonstrative of criminal knowledge relating to the alleged conspiracy.

With respect to the petitioner Manfredi however, the proofs presented an altogether different picture. No converstaion of the petitioner were ever overheard or recorded. No informants or surveilling agents ever connected petitioner to any known delivery of drugs. Likewise, petitioner was never connected, by observations, hearsay, or otherwise, to any of the customers or associates of the ostensible central personality in the alleged conspiracy — Joseph LaCosa. Finally, upon his surprise arrest, no evidence was recovered from petitioner or his home demonstrating any connection whatsoever to the conspiracy charge, or for that matter, to any other crime. Proof of petitioner's involvement in a conspiracy to distribute drugs was of the most tentative variety, highly circumstantial at best, and depended mainly upon the content of two telephone conversations had by the defendant Joseph LaCosa with third persons, which conversations had been tapped and which obliquely referred to LaCosa's uncle [the petitioner] as his source of narcotics. These intercepted conversations among

co-conspirators comprised pure hearsay as to petitioner and the record showed no independent proof tending to establish petitioner as a member of the conspiracy. This case, therefore, presents a serious issue respecting the legal sufficienty of the proofs which comprised prejudicial heresay not subject to cross-examination.

a. The Trial Proofs as They Bore Upon Petitioner

The proof against petitioner fell into categories consisting mainly of hearsay. For example, two government witnesses who had been co-conspirators testified that Joseph LaCosa told them that his "boss" or supplier, was his Uncle "Joe" [petitioner]. The only other significant 'factual' indicator of complicity relates to two telephone calls involving Joseph LaCosa and a co-defendant Yanni. In the first of these conversations LaCosa — presumably discussing his supplier stated "I missed the guy tonight . . . . I just missed him by 5 minutes. He told me to come over, he called me up."

The alleged criminal significance of this conversation is that on the day when the aforesaid telephone conversation was had, a narcotics agent planted near petitioner's home allegedly saw LaCosa drive up just a few minutes after petitioner had driven away. Thus, while LaCosa and petitioner had not met with each other on the day in question, LaCosa's later report over the telephone that he had "missed the guy" was offered as proof that he had a criminal arrangement respecting narcotics with petitioner. LaCosa did not take the stand, so that his hearsay reference to petitioner obliquely identifying him as LaCosa's drug source fully escaped cross-examination.

Two days later, LaCosa was overheard on the telephone (by a wiretap) stating to defendant Yanni that he would "see him [his supplier] — tomorrow . . . 2 or 3 o'clock in the afternoon." The criminal significance of this hearsay reference emerged through the testimony of an agent that, on the day following the aforesaid tapped telephone call, LaCosa drove to petitioner's home at about 2 p.m. Several hours later a string of visitors appeared at the LaCosa home. From this, the Government argued that LaCosa had met petitioner at the latter's house during the day to discuss drugs and that, in the ensuing hours, LaCosa probably went somewhere to pick up a supply of narcotics which he very likely doled out to his nighttime visitors. As indicated above, LaCosa did not take the stand so that his hearsay utterances to the defendant Yanni (who likewise did not take the stand) were immune from cross-examination. Apart from the foregoing, the record failed to disclose independent proof establishing petitioner as a member of the conspiracy.

b. Respecting the Wiretap Orders

On September 14, 1971, the Rockland County Supreme Court of the State of New York granted wiretapping orders allowing interception of telephone calls at the residences of two of the defendants (LaCosa and Schrader). In the affidavits underlying the wiretap applications, petitioner was specifically designated as a target of the proposed interception. Each of the two separate wiretap orders was to be effective for the thirty (30) day period commencing on September 17, 1971. Each wiretap was successfully installed and each was renewed for an additional 30 day period. The wiretap orders specifically provided for interception on a 24 hour,

'around the clock' basis. Upon the completion of 60 days of continuous interceptions, terminating on November 14, 1971, the taps were discontinued. By additional court order, however, notification to the affected parties of the fact of the interceptions was deferred to May 31, 1972, a date some weeks subsequent to the arrests of petitioner and his co-defendants.

The orders authorizing telepnonic interception, in contravention of both state and federal statutes, failed to contain any direction requiring 'minimization' of interception [18 U.S.C., Section 2518(4)(d); New York Criminal Procedure Law, Section 700.30(7)]. As a consequence, every single telephone conversation occurring during the 60 day wiretapping period was intercepted and recorded in full by federal agents who manned the taps on a 24 hour a day basis. As a result of this pervasive and wholly unrestricted wiretapping, federal agents audited and recorded 1,595 telephone calls. It is undisputed that only 23 of the intercepted calls, of the 26 which were offered into evidence, were in any way relevant to the indictment. An enormous number of calls involved completely innocuous telephone conversations of children, housewives, relatives and friends. All of these were concededly recorded in full and minimized in no way.

At the suppression hearing, the state officer in charge of procuring the wiretap orders acknowledged that none of the agents involved in monitoring the taps were ever instructed to minimize, or otherwise restrict the interception of irrelevant or non-pertinent telephone calls. In no instance was the wiretapping and recording equipment turned off in order to screen out conversations

not covered by the wiretap orders. In fact, the federal narcotics agent (White) leading the investigation acknowledged that his instructions were to "listen to all conversations."

The suppression record, therefore, discloses three determinative facts:

1. The wiretap orders contained no direction whatsoever to minimize interception.

2. The agents who did the monitoring were instructed to intercept and record in full every telephone call, regardless of pertinence or relevance to the crimes charged.

3. In fact, every telephone call utilizing the instruments at the two residences in question was intercepted and recorded. A mere 23 of the 1,595 intercepted conversations were relevant and admissable at the trial.

While the applications for wiretap orders were made by state police officials with the announced purpose of the proposed wiretappings to be conducted by state officers, the day to day operation of the wiretapping venture was given over entirely to federal officers. Indeed, the wiretapping orders specifically directed that the wiretapping procedures be conducted by the District Attorney of Rockland County, the employees in his office, and/or members of the New York State Police. No provision whatsoever was made for the tapping procedure to be turned over to any federal agents and no federal officer ever made application to the Rockland County Court requesting designation of himself, or any other

federal agents, to conduct wiretapping operations. Under applicable New York State Law "an eavesdropping warrant *must* be executed according to its terms by a law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications" (N.Y. Criminal Procedure Law, Section 700.35; emphasis added).

c. Regarding the Trial Courts' Denial of an Adjournment Notwithstanding the Advent of a Deluge of Prejudicial Pre-Trial Publicity.

On August 9, 1972, approximately one week prior to the commencement of proceedings in this case, petitioner Manfredi's two young nephews, Philip J. Manfredi (a defendant in this case) and Philip D. Manfredi were executed in a vacant lot in Bronx County. One youth had been shot through the head and the other, attempting to escape his assassins, was gunned down by blasts into the back. The fact of these homicides was given extraordinary coverage by all the media. Photographs of the quite young men sprawled out in death were circulated in newspapers and on television. Since one of the dead men was a defendant in this case, and both were related to petitioner Manfredi, the reportage given to the homicides was in the context of a gangland 'war' related to competition in the marketing of drugs. In short order, every phase of the media (press, TV, radio) gave intensive and recurrent coverage to the news event. The reportage of the killings was, moreover, played directly into the impending trial of the instant case, and as regards petitioner Manfredi, was slanted in such a way as to make it seem that he was at the apex of an illicit drug distribution system. Significantly, the publicity was *not* a concomitant of the case itself or its

principals. It was the result of facts extrinsic to the case which, when they occurred, ignited the very context of the case and the enviornment in which the trial was to take place.

The avalanche of pre-trial publicity caused all counsel to make timely, repeated, but vain applications to the trial court for an adjournment in order to allow the swell of publicity to subside (S21-38; Ct. Exh. 1). The court, however, adhered to a position of collecting the offensive material from counsel, reviewing these *in camera*, and saving the issue for resolution depending upon the outcome of the voir dire of jurors (S38, S236, S243, S569, S635-648; Exhs. la, b, c; 4). We contend that this procedure denied the petitioner Manfredi of a fair trial.

In preparation for the jury voir dire, the defense, quite naturally, proposed that no specific mention of the Manfredi homicides be made during the questioning of jurors (S648). Surprisingly, however, the Court broached the issue of publicity to the panel in the following, utterly unspecific fashion:

> "Now, has any juror presently seated in the jury box, to your knowledge, heard either on the radio or television or read any newspaper or printed account of anything having to do with this case?
>
> I would be frank to say that it has been brought to my attention in earlier proceedings that there has been some publicity in the press and media about this case in the past.

I simply want to know from you seated in the box at the moment whether or not you recall reading anything about this case or any individual who is a party to this case or a lawyer, or whatever, having to do with this case?

If you recall any such publicity that you read or you viewed or you heard over television or radio, or one of them simply raise your hand. All right."

An examination of the minutes discloses that the inquiry did jog the memory of one juror — but she could not recall what she had read. Another juror mentioned that he, too, "might have read about" the case, but he, likewise, wasn't sure.

The inquiry conducted by the court appears to have left the trial judge satisfied that the panel, as finally comprised, was capable of rendering a fair verdict unaffected by the torrent of publicity which preceded the case. Notwithstanding the court's refusal to adjourn the matter, defense counsel persisted in introducing further evidence that the trial could not be fair, coming so closely upon the heels of the news of the Manfredi killings and associated coverage detailing the ignition of a 'drug war' (Ct. Exhs. 1 and 4).

REASONS FOR GRANTING THE WRIT

I.

THE MOTION TO SUPPRESS WIRETAP EVIDENCE WAS ERRONEOUSLY DENIED.

In contravention of New York State statutory requirements, the state wiretap order contained no direction to minimize interceptions. The agents manning the wiretap were also personally instructed to intercept and record every utterance. The interception of every conversation, over a period of 60 days, for 24 hours of each day, without any minimization whatsoever, constituted a general search. In further contravention of state law, federal agents alone conducted the wiretap operation under a State Supreme Court order limiting implementation of the wiretap operation to state officers.

A. The Wiretap Orders Contained No Provision Requiring Minimization.

The orders of the Rockland County Supreme Court authorizing the interception of telephone calls failed to comply with applicable mandatory standards imposed by New York State Law. None of the wiretap orders contained provisions directing that interceptions be minimized. The Court of Appeals, in its opinion below (Appendix C, 10a) acknowledged that since New York State wiretap orders were involved rather than orders of a Federal District Court — the wiretap issues presented in this case would have to be disposed of in accordance with New York State Law (see also 488 F.2d, 598). This recognition of the applicability of New York State Law should have compelled the Court of Appeals to strike

down the wiretap orders in this case by reason of their failure to contain provisions for minimization. Under New York State Law [Criminal Procedure Law, Section 700.30(7)] it is obligatory to include in every wiretap order a provision for minimization. Thus, it is set forth in the New York statute that:

> "An eavesdropping warrant *must* contain: . . .
>
> 7. A provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception . . . . " (Emphasis added.)

The requirement that minimization "*must*" be set forth, in terms, in the surveillance warrant under state law, renders the orders in this case defective on their face. The minimization requirement was the direct legislative outgrowth aimed at curing the defects in procedure focused upon in *Berger v. New York*, (1967) 388 U.S. 41. The absence of a minimization requirement in *Berger* rendered the New York wiretapping procedure co-extensive with the historically odious general search.

According to Title 18 U.S.C. Section 2518(10)(a)(ii), a wiretap order which is "insufficient on its face" is specifically subject to suppression. Unless the provisions of the federal statute (18 U.S.C. Section 2510 *et seq.*) have been complied with, the contents of any intercepted communication and any evidence derived therefrom, may not be received in evidence (18 U.S.C. Section 2515). The "must" requirement set forth in New York C.P.L. 700.30 (7) "is not merely directory but is mandatory"[*People v. Holder*, 331 N.Y.S.2d 557, 568, and see *People v. Haskell*,

9 N.Y.2d 729, 730, 214 N.Y.S.2d 344, 345; *People v. Kennedy*, 347 N.Y.S.2d 327; *Cross v. State*, 225 Ga. 760, 171 S.E.2d 507; *State v. Siegel*, 13 Md. App. 444, 285 A.2d 671 (1971)]. It appears inescapable, therefore, that under the minimal standards applicable under federal and state law, the eavesdropping warrants in this case were vitally defective for failing to enunciate the requirement of minimization, and that omission vitiated all the electronic surveillances conducted under them.[1]

The opinion of the Court of Appeals makes no effort whatsoever to give to New York State's obligatory terminology "must" — as quoted above — its fair and reasonable semantic import. This avoidance of 'plain meaning' is manifestly erroneous since the New York statute chose to employ the term "must" although the federal guidepost statute on the same subject of wiretapping (18 U.S.C. Section 2518[5]) merely states that:

> "Every order . . . *shall* . . . contain a provision that the authorization [to tap] *shall* be conducted in such a way as to minimize the interception . . . " (Emphasis added.)

Where a state legislature, such as New York's, drafts a wiretapping statute in terms clearly more rigorous on its face than those permitted under its *federal* statutory progenitor, it does violence to concepts of federalism for a federal appellate court to water down the state law

1. See also *United States v. Todaro*, (D.C.W.D.N.Y.; CR. 1970-142); *United States v. Joseph*, (D.C.W.D.N.Y.; CR. 1971-2); *United States v. Appoloney*, (D.C.W.D.N.Y.; CR. 1971-22).

respecting search and seizure to a level *below* that designedly posted by the New York State lawmakers. This argument is not lightly made since it was New York State, after all, which first grappled with the wiretapping problem on a statutory level — and failed (*Berger v. New York*, [1967] 388 U.S. 41). New York State legislators, and their drafting experts, who were acutely aware of the *Berger* holdings, as well as the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, did not casually and unthinkingly make minimization a "must" in the New York statute, when quite different, and permissive, congressional language was so near at hand for use, if such use had been desired. The opinion of the Court of Appeals likewise overlooks the decision in *People v. Holder*, 331 N.Y.S.2d 557, 568, wherein the Nassau County Court of New York found the "must" requirement "not merely directory but . . . mandatory". The opinion of the Court of Appeals also, flies in the face of other New York State court cases which treat the 'requirement' of a minimization provision in the court's order as being absolutely obligatory (*People v. Kennedy*, 347 N.Y.S.2d 327).

In effect, the Court of Appeals has, by its decision and opinion, rewritten a New York State statute which had been quite carefully drafted in the first instance to meet New York's own special conception of a search and seizure standard which it — in its own sovereignty — could properly promulgate. The conflict and uncertainty thus promoted by the action of the Court of Appeals renders this case particularly desirable for further review.

The opinion of the Court of Appeals, in attempting to deal with the question raised under this heading, observes that the affidavit of state officer Crodelle submitted in support of the state wiretapping warrants does contain language stating an intention to "limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations." In apparent reliance upon *United States v. Tortorello*, 480 F.2d, 781, the Court of Appeals suggests that Crodelle's affidavit may be read into the wiretapping warrants and thereby cure their facial deficiencies. This argument overlooks, or ignores, the special fact situation which prevailed in *Tortorello;* that is, that the State Supreme Court justice in that case *specifically incorporated by reference* the language of the underlying affidavits into that court's wiretapping warrant. That distinction was far too vital to be ignored or overlooked.

B. Minimization Was, In Fact, Never Carried Out. At All Events, The 'Remedy' of Erasure of Improper Interceptions Defeats the Purpose of the Statute Authorizing Suppression. The Utilization of Federal Officers to Conduct the Wiretapping Was Also Unlawful.

The opinion of the Court of Appeals acknowledges what the Government conceded in the trial court, that is that for 60 straight days *every* single telephone call made over the tapped telephones was both recorded on tape and audited both at the moment of occurrence and upon replay of the tapes. A total of 1595 telephone calls were, accordingly, audited, intercepted and captured electronically. A mere twenty-seven conversations were offered by the Government as relevant to the charges, and

only twenty-three (23) of the taped conversations were admitted into evidence. Such unbridled and unselective interception on a grand scale, showing that the agents were "free to seize at will every communication that came over the wire", constituted a general exploratory search (*United States v. Kahn*, U.S. ,[72-1328] 14 Cr. L. Rept. 3101, 3105). Notwithstanding that judicial assertion, the Court of Appeals has amazingly concluded that this wholly unrestrained and unrestricted interception of telephone conversations shows "prima facie . . . compliance with the minimization provision . . . .' (Slip Opinion, 5615; Appendix C).

The foregoing assertion by the Court of Appeals overlooks or ignores the fact that state officer Crodelle, whose affidavit seemed to suggest that minimization procedures would be utilized, played no part in the conduct of the wiretaps. Crodelle quickly turned the entire operation over to federal officers who had merely used Crodelle as an instrumentality to secure a state wiretap warrant. Crodelle did not supervise these federal officers, nor instruct them, regarding minimization, or his affidavit assurance to the Supreme Court justice respecting 'planned' minimization.

Good faith attempts at minimization were, in fact, never put into operation. Moreover, the wiretap operation was turned over to federal officers who never reported to the State court. Nor were they even facially accountable to the State Supreme Court, as was required by CPL Section

700.30 and CPL Section 700.35(1). [2] Accountability to court supervision is a keystone of the federal and state wiretap statutes. Here, unlike *United States v. Bynum*, 485 F.2d 490, there was no judicial supervision of any sort — and the party primarily and officially charged with responsibility for ministering to the wiretaps subcontracted out that responsibility without so much as checking upon the conduct of his delegates, or even alerting the issuing court to the fact that he had informally delegated his authority to wiretap at its very inception. These procedures do not, as the Court of Appeals suggests, show a commendable state-federal collaboration. Rather do they demonstrate how local law enforcement agencies allow themselves, in violation of the statute, to become strawmen for federal operatives.

The Court of Appeals has also observed in its opinion that the relief available to injured parties in a case such as this is to apply for an order authorizing erasure of "non-pertinent" interceptions (Slip Opinion, 5616; Appendix C). This proposal has the effect of rendering the New York statute's minimization provision entirely useless in terms its acting as a workable guaranty to protect individual privacy. The opinion of the Court of Appeals thus sounds out in the Second Circuit the dreaded passing into legal history of the great rule of suppression enunciated in *Mapp v. Ohio*, 390 U.S. 39. Moreover, the

2. This section provides that "an eavesdropping warrant *must* be executed according to its terms by a law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications". In this case, all of the wiretapping was carried out by federal agents notwithstanding the fact that the wiretap orders were specifically limited to state officers.

Court of Appeals' tentative decision in this regard conflicts with substantial contrary authority in New York *(People v. Holder*, 331 N.Y.S.2d 557, 571; *People v. Kennedy*, 347 N.Y.S.2d 327; see also *United States v. Scott*, [D.D.C. 1971] 331 F.S. 233; *United States v. Focarile*, [D. Md. 1972] 304 F.S. 1033, 1046-7). As stated in *Holder*, at p. 571:

> "only by imposing a prophylactic rule can the Court effectively protect itself from becoming an unwilling participant in illegal governmental activity and protect the privacy of citizens."

One of the most troubling aspects of the opinion of the Court of Appeals is that it states unequivocally that the appellants failed to sustain their burden to show *how* the government's procedures at minimization could have been improved upon (Slip Opinion, pp. 5616-7). We know of no such burden in law, and view it as a novelty. What is more, we contend that, in a case such as this where *absolutely no attempt* was made by the government to minimize interceptions, the government has made no credible showing, of its own, of any sort respecting minimization such as would shift any supposed burden respecting that subject to the already bent backs of the privacy-robbed petitioners.

II.

APPELLANT MANFREDI'S MEMBERSHIP IN THE CONSPIRACY WAS NOT ESTABLISHED BY LEGALLY SUFFICIENT EVIDENCE.

The opinion of the Court of Appeals arrives at the conclusion that there "was sufficient circumstantial evidence independent of hearsay declarations from which Manfredi's participation in the conspiracy could be inferred" (Slip Op. 5606-7). The error of the reasoning of the Court of Appeals, under this heading, is that it ignores or overlooks the test applicable in the Second Circuit requiring that proof of membership in a conspiracy is required to be shown:

> "by a fair preponderance of the evidence *independent* of the hearsay utterances" (*United States v. Geaney*, (1969) 417 F.2d 1116, 1120, cert. den. 397 U.S. 1028; emphasis added).

The conclusion of the Court of Appeals does not even attempt to come to grips with our argument that the *independent* proof in this case was improperly taken together *with the hearsay* before it became even remotely suggestive of criminal complicity. The fact that petitioner was seen leaving his home just about five minutes before the defendant LaCosa drove up is evidence which is not *independently* probative of membership in the alleged comspiracy. Its significance, if any, derives entirely from certain hearsay utterances made by LaCosa to a third person during a tapped phone call when LaCosa intimated that he had just missed meeting his source of supply (although LaCosa did not use these words). However, the

test of *Geaney* does not permit the joinder of hearsay to non-hearsay proof in order to make the latter legally significant. *Geaney* requires that the non-hearsay proof constitute "*independent*" evidence of conspiratorial connection. The non-hearsay proof in this case simply does not meet that requirement.

Nor, for that matter, does it appear that LaCosa's two alleged trips to the home of petitioner — who was his uncle — constituted proof *aliunde* establishing petitioner's connection with the conspiracy (*Glasser v. United States*, 315 U.S. 60, 74). On the first occasion, petitioner and LaCosa never even encountered each other. On the second occasion, petitioner was seen in his own driveway as LaCosa drove away from the premises. No transfer of contraband was seen or overheard. It is well-nigh incredible that these two solitary instances of seeming visitation, in circumstances wholly bereft of criminality, should be able to constitute independent proof of membership in a criminal conspiracy. Only by means of arrant speculation could such a conclusion be reached. The conviction in this case is, therefore, based upon proofs which are legally insufficient as a matter of law; that is, evidence which has been lifted "by its own bootstraps to the level of competent evidence" (*Glasser v. United States*, 315 U.S. 70, 75).

III.

THE REFUSAL TO DELAY THE TRIAL WAS PREJUDICIAL TO PETITIONER.

The responses of the jurors on the voir dire indicating negligible, if any, exposure to the radiation of the pre-trial publicity, was most suspect on its face. The mass of materials received by trial court makes it certain that the pre-trial publicity in this case was quite extraordinary in quantity, and most grave from the viewpoint of its prejudicial content. It is entirely possible that the Court's questioning of jurors presented the issue so obliquely and so barrenly of notice, that the panel could not immediately perceive the relationship of the trial to the deadly events which had taken place, so shortly before, outside of the courtroom. As the trial progressed, the increased repetition of Philip Manfredi's name, his unexplained absence from the trial (he was now deceased), and the references to various locations in the Bronx (where the Manfredi corpses were recovered), very likely supplied the catalysis for association by jurors with what had been earlier disseminated in the media. Alternatively, the panel — as some jorors in the *Watergate* case were seen to do — simply refused to acknowledge any awareness on their part of what the media had reported respecting the case. [3]

Concededly, the trial court did make some precautionary inquiries to determine the possibility of jury

3. In the *Watergate* case, Judge Sirica flatly rejected the assertions of various veniremen that they had never read of the break-in at the Watergate premises.

prejudice based upon media reports. We contend, however, that those measures were entirely insufficient in the face of the publicity broadside which actually preceded the case. The scope of that barrage necessarily affected jury cognition and can only be gauged by examining the exhibits actually submitted to the court (Ct. Exhs. 1 and 4). Included among these were numerous radio and television scripts and film clips, covering, in great concentration on repeated newscasts, the period from August 8, 1972 through August 11, 1972 (NBC; WPIX; ABC; WNEW; CBS). *Front page* editions of the New York Times, New York Daily News, and New York Post, with shocking photographs, for the same period, detailed the identical, bloody news. Other items regarding the Manfredi killings and gang warfare relating to narcotics appeared in the Journal News of Rockland County, the Herald News of Bergen County, and Time Magazine (Ct. Exhs. 1J, 1K, 1L, 1M, 10). In connection with these items, the petitioner Manfredi was described, variously, in these terms:

> "[the dead men were] nephews of Joseph Manfredi, a capo in the Gambino family" (Ct. Exh. 1J; NBC transcript).
>
> "Gang warfare over drugs .... The Manfredis, cousins were related to Jojo Manfredi — reputed cappo [sic] in the crime family of Carlo Gambino" (Ct. Exh. 1A, WINS transcript).
>
> "... nephews of Joseph Jo Jo Manfredi a lieutenant of organized crime boss Carlo Gambino" (Ct. Exh. 1D, WNEW—TV transcript).

> "Joseph Manfredi, 46 year old reputed underworld leader from Lodi, N.J." (Ct. Exh. 1K, Journal News of Rockland Co.).

It is inconceivable that the publicity generated by the murder of the Manfredi cousins *just prior* to the trial did not prejudicially affect the appellant in the minds of the jurors. Significantly, this was publicity not generated by the case itself — but some other news playing directly into it. That news was so ghastly and pitiful regarding the slaying of the two young cousins that anyone who read a newspaper, listened to a radio, or watched television, could not escape its impact. Petitioner was made to appear as some sort of Fagin whose young lieutenants were being consumed in a drug war between rival elders — blacks and whites. The trial court's own experience — backed up by the exhibits given over to the court — verified the strong likelihood that the case was now such a curiosity that few jurors would want to avoid hearing all about it — in the flesh. In these circumstances, it was an abuse of discretion on the part of the court to refuse even a short adjournment to let the festering news abate [*Marshall v. United States*, (1959) 360 U.S. 310; *Delaney v. United States*, (1st Cir. 1952) 199 F.2d 107,114-115]. As indicated in *Hale v. United States*, (8 Cir. 1968) 435 F.2d 737, 746:

> "Recent Supreme Court cases have fashoned the principle that in certain extreme circumstances where there has been 'inherently prejudicial publicity' *McWilliams v. United States*, 394 F.2d 41, 44, (8 Cir. 1968) *the actual existence of prejudice in the jury box need not be shown*" (emphasis added).

Notwithstanding the ambiguous results of the faintly posted voir dire which was conducted in this case, we contend that the media reports regarding the demised young Mr. Manfredis, the 'capo' status of their uncle, Joseph Manfredi, and his alleged mastermind status in the instant case constituted "inherently prejudicial publicity which saturated the community" [*Sheppard v. Maxwell*, (1966), 384 U.S. 333, 363; *Ervin v. Dowd*, 366 U.S. 171; see also *Rideau v. Louisiana*, 373 U.S. 723; *Doggett v. Yeager*, (3 Cir., dec. Jan. 26, 1973) 12 Cr.L. 2423]. In a case as close on its facts as this one, the trial court's refusal to grant appellant Manfredi an adjournment constituted prejudicial error.

IV.

THE FEDERAL WIRETAPPING STATUTE (TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968) IS UNCONSTITUTIONAL.

The constitutionality of Title III (the wiretapping statute) was raised below and rejected by the Court of Appeals. In so doing, the Court below referred to its own decision in *United States v. Tortorello*, 480 F.2d 764, cert. den. 42 U.S.L.W. 3181 (October 9, 1973). The Court of Appeals additionally observed that the issues raised under this heading are presently before this Court in *United States v. Giordano*, 469 F.2d 522, cert. granted, 411 U.S. 905. As the *Giordano* case has recently been orally argued before the Court in regard to the issue of constitutionality posed herein, and that matter is presently pending decision, we respectfully adopt as our own all of the applicable arguments raised in that case by the petitioner therein.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Lawrence K. Feitell
Attorney for Petitioner

APPENDIX A – ORDER OF AFFIRMANCE

(Dated November 23, 1973)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23 day of November, one thousand nine hundred and seventy-three.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. JOHN F. KILKENNY,

HON. JAMES L. OAKES,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Philip John Manfredi,, a/k/a "Little Philip", Timothy Schrader, Josephine Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Dominick Trinchera, George Del Nevo, Vincent D'Amico, Horace Marble, William Marble, Thaddeus Byrd, Melvin Calvin, Herman Grant, Robert Mayo, John Doe, a/k/a "Frank", John Roa, a/k/a "Alex", Robert Doe, a/k/a "Benny",

Defendants,

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Timothy Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Herman Grant, Robert Mayo,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

APPENDIX B – ORDER DENYING REHEARING

72-2270-82

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN, Chief Judge

HON. JOHN F. KILKENNY,

HON. JAMES L. OAKES, Circuit Judges

United States of America,

Plaintiff-Appellee,

v.

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Philip John Manfredi, a/k/a "Little Philip", Timothy Schrader, Josephine Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Dominick Trinchera, George Del Nevo, Vincent D'Amico, Horace Marble, William Marble, Thaddeus Byrd, Melvin Calvin, Herman

Order Denying Rehearing

Grant, Robert Mayo, John Doe, a/k/a "Frank", John Roa, a/k/a "Alex", Robert Doe, a/k/a "Denny",

Defendants,

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Timothy Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Herman Grant, Robert Mayo,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant, Joseph Manfredi.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ A. Daniel Fusaro
Clerk

by:
Vincent A. Carlin
Chief Deputy Clerk

APPENDIX B – ORDER DENYING REHEARING

72-2270-82

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and seventy-four.

United States of America,

Plaintiff-Appellee,

v.

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Philip John Manfredi, a/k/a "Little Philip", Timothy Schrader, Josephine Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Dominick Trinchera, George Del Nevo, Vincent D'Amico, Horace Marble, William Marble, Thaddeus Byrd, Melvin Calvin, Herman Grant, Robert Mayo, John Doe, a/k/a "Frank", John Roa, a/k/a "Alex", Robert Doe, a/k/a "Denny",

Defendants,

Joseph Manfredi, Frank LaCosa, Joseph LaCosa, a/k/a "Duke", Vincent Yanni, a/k/a "Butch", Timothy

Order Denying Rehearing

Schrader, Charles Cassarella, Anthony Colangelo, a/k/a "Tony Cole", Herman Grant, Robert Mayo,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellant, Joseph Manfredi, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ Wilfred Feinberg
Acting Chief Judge

EXHIBIT C – OPINION OF COURT BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 922-26—September Term, 1972.

(Argued May 24, 1973 Decided November 23, 1973.)

Docket Nos. 72-2278-82

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH MANFREDI, FRANK LACOSA, JOSEPH LACOSA, VINCENT YANNI, TIMOTHY SCHRADER, CHARLES CASSARELLA, ANTHONY COLANGELO and ROBERT MAYO,

Appellants.

Before:

KAUFMAN, KILKENNY* and OAKES,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* convicting all appellants of conspiracy to distribute narcotics in violation of 26 U.S.C. §§ 4705(a) & 7237(b) and 21 U.S.C. § 846, convicting appellant Joseph LaCosa of engaging in a continuing criminal enterprise involving narcotics in violation of 21 U.S.C. § 848, and convicting appellant Joseph LaCosa of distribution of heroin in violation of 21 U.S.C. § 841.

Convictions affirmed.

* Of the Ninth Circuit Court of Appeals, sitting by designation.

LAWRENCE FEITELL, New York, N. Y., *for Appellant Manfredi.*

IRVING ANOLIK, New York, N. Y., *for Appellants Joseph LaCosa, Frank LaCosa, Schrader and Cassarella.*

LEWIS E. ALPERIN, Mount Vernon, N. Y., *for Appellants Yanni and Colangelo.*

PIERRE N. LEVAL, New York, N. Y., *for Appellant Mayo.*

JOHN M. WALKER, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Kenneth R. Feinberg and Richard J. Davis, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is from convictions arising out of the operation of a large-scale narcotics ring from suburban New York and New Jersey which supplied dealers and distributors in Harlem. Questions are raised both as to the sufficiency of the evidence and as to the reception of evidence obtained from wiretapped and recorded telephone conversations. A number of the questions of law involved were also *sub judice* by another panel of this court in *United States* v. *Bynum,* 475 F.2d 832 (2d Cir. 1973). There was in that case a remand to the district court for an evidentiary hearing in respect to legality of the wiretap evidence; a decision in this case was withheld pending that evidentiary hearing and the opinion of the *Bynum* panel after remand, which has now been filed. *United States* v. *Bynum,* Nos. 72-1857, -1884, -2101, -1763, -2142, -2143 (2d Cir. Sept. 24, 1973), slip op. at 5293 *et seq.* Some of the questions,

particularly with respect to the necessity for "minimization" of the wiretaps and of what that minimization should consist were answered by the court in *Bynum* and in part on the basis thereof we affirm the judgments below.

For treatment of the issues involved here, however, we must recount the evidence specifically and in some detail recount the wiretap evidence, that is to say, the evidence obtained by use of the wiretaps and the way in which the wiretaps were conducted.

I. The Facts

A. *The evidence prior to the wiretaps.* The overall proof of the Government was to the effect that Joseph LaCosa was the most visible member of a family narcotics business[1] involved in distributing millions of dollars' worth of heroin and cocaine in the period between April, 1970, and April, 1972. His principal, if not sole, source for the heroin was, according to the Government's case, his uncle who lived in New Jersey, Joseph Manfredi, and one of his principal assistants was his cousin, the late Philip J. Manfredi. Other family members also convicted include his father, Frank LaCosa, and his cousin Timothy Schrader. All of these defendants and Vincent Yanni, Charles Cassarella

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1 Joseph LaCosa, his wife, Madelyn, and his parents, Frank LaCosa and Mary Manfredi LaCosa, lived at 11 Daisey Court, Nanuet, New York. Philip J. Manfredi, now deceased, his sister, Josephine Manfredi Schrader, and her husband, Timothy Schrader, lived at 10 Sable Court, West Nyack, New York. Joseph's mother, Mary, is the sister of Joseph Manfredi whose home was 115 Kipp Avenue, Lodi, New Jersey. Philip J. Manfredi's second sister, Dianne, is married to appellant Charles Cassarella, and their home is 2262 33rd Street, Astoria, Queens. Josephine Schrader, Dianne Cassarella and Philip J. Manfredi were the children of Urbano Manfredi, a deceased brother of Joseph Manfredi and Mary LaCosa. From time to time, the evidence discloses, Joseph Manfredi drove a 1970 Thunderbird registered to Frank LaCosa but at Joseph Manfredi's New Jersey address, while Joseph LaCosa and/or Philip J. Manfredi often drove two Cadillacs registered to Timothy Schrader.

and Robert Mayo, all of whom were distributors or dealers who purchased from the LaCosa-Manfredi family, and Anthony Colangelo, a supplier of cocaine, were convicted below on Count I of an indictment alleging a conspiracy to distribute narcotics in violation of 26 U.S.C. §§ 4705(a) and 7237(b) and 21 U.S.C. § 846. Joseph LaCosa was charged under Count II of the indictment with, and convicted of, "engaging in a continuing criminal enterprise" involving narcotics in violation of 21 U.S.C. § 848 and under Count III with distribution of heroin in violation of 21 U.S.C. § 841.[2]

The Manfredi-LaCosa narcotics organization numbered among its customers Horace and William Marble, Herman Grant, Robert Roseboro, Thaddeus Byrd, and Garland Currie (now deceased), in addition to the other convicted defendants. Horace Marble, who was in partnership with Herman Grant in the heroin traffic in Harlem, met Joseph LaCosa, under the name "Joey," on April 10, 1970. Commencing with the purchase of one ounce of heroin on the following day, another ounce three days later, and then one-eighth of a kilogram, Horace Marble became a regular purchaser from Joseph LaCosa who, sometimes accom-

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2 There were 13 other original defendants. Of these, three—Horace Marble, William Marble and Thaddeus Byrd—were severed prior to trial, pleaded guilty, and testified for the Government against the appellants here. Three others were severed on the Government's motion. Five others could not be arrested. Philip J. Manfredi was murdered prior to trial. Herman Grant was convicted with appellants but murdered following the filing of his notice of appeal. Joseph Manfredi was sentenced as a second narcotics offender to 30 years' imprisonment and a $25,000 commuted fine. Joseph LaCosa was sentenced to 15 years' imprisonment on Counts I and III and 30 years' imprisonment on Count II with the prison terms to run concurrently and a $100,000 commuted fine. Frank LaCosa was sentenced to 10 years' imprisonment and a $15,000 fine, Vincent Yanni to eight years' imprisonment, Charles Cassarella to six years' imprisonment, Anthony Colangelo to 10 years' imprisonment, Robert Mayo to nine years' imprisonment, and Timothy Schrader to seven years' imprisonment.

panied by Philip J. Manfredi, personally delivered the heroin to Marble until October of 1971 when Marble was arrested. Marble alone purchased between one and two kilograms of heroin per week at prices of $23,500 for one kilogram and $46,000 for two kilograms from the summer of 1970 to October of 1971. Most of the deliveries took place at Third Avenue and 76th or 86th Street in New York after a telephone call from LaCosa to Marble, with payment being made for the preceding shipment each time. William Marble, who was involved in his brother's distribution organization, sometimes received the telephone calls from LaCosa and relayed messages to his brother or occasionally himself picked up heroin from LaCosa or Philip J. Manfredi, including some smaller amounts for his own use. While it is nothing new perhaps to the avid readers of Second Circuit opinions, it might be mentioned that a purchaser such as Horace Marble with his 20-person heroin milling and distribution organization was engaged in an operation so widespread that each of the 17 or so sellers in the group supplied about 50 addicts with heroin. Each kilogram of heroin purchased from LaCosa produced about 600 "bundles," each bundle consisting of 25 "bags," the "bags" in turn each selling for five dollars on the street, so that the street value of each kilogram was about $75,000. Joseph LaCosa, who was not one to hide his light under the proverbial basket, identified his heroin connection to Horace Marble as his uncle, who LaCosa said was "big and in organized crime," adding that his uncle picked up the heroin from the trunk of a car in New Jersey. LaCosa also told Horace Marble that he had another customer in the District of Columbia who purchased four kilograms of heroin per week, so that Marble was only his second biggest customer. Marble once totaled the bills he received from LaCosa for heroin delivered to him as close to one million dollars.

In the latter part of 1970 Joseph LaCosa, who apparently had access to more narcotics than Horace Marble and his Washington, D. C., customer could buy, asked Horace to locate additional dealers for him. Marble introduced him to Robert Roseboro, who testified for the Government. Roseboro had his own heroin milling operation and purchased half-kilogram packages on a bi-weekly basis with deliveries made at the Gracie Square Hospital where Roseboro was on methadone maintenance. On December 15, 1970, Roseboro delivered a half-kilogram of heroin obtained from LaCosa to Agent White of the Bureau of Narcotics and Dangerous Drugs (BNDD) and was then arrested and agreed to cooperate with the Government. After his arrest he met LaCosa while under surveillance and at these meetings LaCosa bragged about his new Cadillac and his new swimming pool and agreed to meet a "customer" from Detroit. Roseboro in turn agreed to pay LaCosa $3,000 which he owed him at his (Roseboro's) apartment. At the apartment LaCosa told Roseboro that his own uncle was his boss and that his uncle's name was "Joe." The purchaser from Detroit, who was a Government agent, put $12,700 in the glove compartment of a rented car and, with Roseboro, met LaCosa at Second Avenue and 70th Street. LaCosa took the car to First Avenue and 84th Street where he abandoned it and joined Philip J. Manfredi in a Cadillac registered to Timothy Schrader. As the Cadillac moved uptown, LaCosa was observed showing a quantity of money to the driver but LaCosa did not return with the heroin as planned. He later told Horace Marble that he believed (quite correctly) that he was being followed by the police. Through Marble, the half-kilogram of heroin was delivered by LaCosa to the Government agent.

Moving to the spring of 1971, Thaddeus Byrd, a gas station attendant, was a drug courier for and in the gypsy taxi business with one Garland Currie, a narcotics dealer

and another one of Joseph LaCosa's customers. Byrd, with Currie, met LaCosa, identified as "Duke," and subsequently picked up heroin from and delivered money to him on Currie's behalf, generally at 80th Street and Lexington Avenue. LaCosa instructed Byrd to use the code word "shirt" for heroin in telephone conversations—just as he had done in transactions with Roseboro. Byrd discussed narcotics over the telephone with LaCosa and, working for Currie, often bought up to two kilograms of heroin in a series of purchases. Byrd was stopped on October 17, 1971, by Agent White of the BNDD after he had delivered money to LaCosa for Currie. Currie died before Byrd saw him again, but Currie's partner, Fred Powell, continued in the business, with Byrd purchasing narcotics twice more from LaCosa.

B. *The wiretap evidence and accompanying surveillance.* On the basis of affidavits by the Rockland County District Attorney, Robert Meehan, State Investigator John Crodelle, and BNDD Agent Frank White, telephonic interception was requested on a 24-hour-a-day basis at the LaCosa home at 11 Daisey Court, Nanuet, New York, and the Manfredi-Schrader home at 10 Sable Court, West Nyack, New York.[3] The affidavit of Crodelle specifically stated: "Your deponent recognized that not all the conversations occurring over the subject telephones will pertain to the said narcotics violations, and accordingly your deponent agrees to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations." Justice Sweeney of the New York State Supreme Court issued warrants commencing on September 17, 1971,

3 The telephone at 11 Daisey Court was listed in the name of Frank LaCosa and at 10 Sable Court in the name of Timothy Schrader.

for wiretaps on both phones permitting law enforcement authorities "to intercept, eavesdrop, listen to and make copies of conversations . . . concerning penal law violations pertaining to the crimes of criminally selling a dangerous drug in the first degree, criminal possession of a dangerous drug in the first degree, and conspiracy to commit violation of the aforesaid sections of law." There was an extension of these orders to November 14, 1971.[4] Surveillance was continuous with monitoring agents of the BNDD taking eight-hour shifts, the only exception being when the Daisey Court LaCosa instrument was out of order between September 30, 1971, and October 20, 1971. During this period every conversation was listened to and recorded. Brief notes on the content of the conversations were made in log books maintained by the monitoring agents. Transcription summaries of conversations were then prepared from the tapes; calls thought to be "non-pertinent" were described only briefly in these transcript summaries. Calls thought by the transcribing agents to be pertinent—some shrouded in the code language recounted above and below—were more fully summarized in the transcript sheets. Verbatim transcriptions were prepared of conversations which were obviously pertinent to the case under investigation.

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4 This extension was obtained under the provisions of N.Y.C.P.L. § 700.40 (McKinney 1971) [hereinafter cited as CPL].

The original order permitting interception ran for 30 days beginning September 17 but was extended for 30 more days on October 15, 1971, upon the renewal affidavit of Investigator Crodelle and the renewal application of District Attorney Meehan. On November 23, 1971, Justice Sweeney ordered the postponement of notice to the owners of the two instruments and the sealing of the intercepted recordings after receiving returns as to both instruments from District Attorney Meehan. Meehan notified both Frank LaCosa and Timothy Schrader of interceptions on May 31, 1972.

Opinion of the Court Below

Twenty-seven conversations were offered in evidence and 24 were admitted.[5] Shortly after installation of the interception device at 11 Daisey Court on September 17, 1971, at 5:03 p.m., appellant Cassarella ordered double what he got "the last time" from Joseph LaCosa with delivery to be that night. Seven minutes later "Benny" spoke with

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5 For trial purposes, the Government selected 27 conversations intercepted from the instruments at 11 Daisey Court and 10 Sable Court. Of these, 24 were admitted into evidence at the trial, which are listed below. All of the conversations in evidence except two were intercepted in the period September 17, 1971, to October 5, 1971.

No.	*Date*	*Time*	*Instrument*	*Participants*
1	9/17	5:03 p.m.	Daisey Ct.	Cassarella/J. LaCosa
2	9/17	5:10 p.m.	Daisey Ct.	F. LaCosa/"Benny"
3	9/20	9:35 a.m.	Sable Ct.	Vinnie/Philip Manfredi
6	9/20	3:27 p.m.	Sable Ct.	Vinnie/Philip Manfredi
7	9/20	3:34 p.m.	Sable Ct.	J. LaCosa/unidentified male
8	9/20	5:20 p.m.	Sable Ct.	Vinnie/Philip Manfredi
9	9/20	5:30 p.m.	Daisey Ct.	J. LaCosa/Mrs. Marble
10	9/20	7:45 p.m. 9:40 p.m.	Sable Ct.	"Roe"/Josephine Schrader
11	9/21	11:15 a.m.	Daisey Ct.	Timothy Schrader
13	9/23	7:47 p.m.	Daisey Ct.	"Frankie"/J. LaCosa
14	9/24	8:00 p.m.	Daisey Ct.	Yanni/J. LaCosa
15	9/26	2:38 p.m.	Daisey Ct.	J. LaCosa/T. Byrd
16	9/26	8:10 p.m.	Daisey Ct.	Yanni/J. LaCosa
17	9/27	4:55 p.m.	Daisey Ct.	J. LaCosa/"Butch"
18	9/27	6:52 p.m.	Daisey Ct.	J. LaCosa/Wm. Marble
19	9/28	6:55 p.m.	Daisey Ct.	Yanni/J. LaCosa
20	9/28	8:00 p.m.	Daisey Ct.	Unidentified male/J. LaCosa
21	9/28	8:20 p.m.	Daisey Ct.	Yanni/J. LaCosa
22	9/28	2:55 p.m.	Daisey Ct.	J. LaCosa/T. Byrd
23	9/29	2:56 p.m.	Daisey Ct.	J. LaCosa/T. Byrd
24	9/29	6:10 p.m.	Sable Ct.	J. LaCosa/Wm. Marble
25	9/29	9:35 p.m.	Daisey Ct.	Yanni/J. LaCosa
26	10/28	8:25 p.m.	Sable Ct.	Cassarella/Philip Manfredi
27	11/ 6	5:40 p.m.	Sable Ct.	"Tony Cole"/J. LaCosa

Frank LaCosa and arranged for a delivery the following week, Frank assuring him that, if he got the money on one day, the "stuff" would be available the next day, or "if it's early enough you can have it the same night. . . ." Three days later at 9:35 a.m. "Vinnie" called Philip J. Manfredi at 10 Sable Court, and at 3:27 p.m. ordered "two shirts" from Philip which the latter agreed to deliver at 7:00 p.m. After a further conversation at 5:20 p.m. between Vinnie's man "Alex" and Philip J. Manfredi it was agreed that delivery would be at the "frankfurter place" on Third Avenue and 86th Street where the Marble deliveries were generally made. Following that call, Agent White observed Philip J. Manfredi leave 10 Sable Court at 6:10 p.m., enter the Schrader Cadillac and drive to Third Avenue and 86th Street in Manhattan where at 7:10 p.m. he got out of the car. Shortly after that he was arrested. Later that evening Philip's sister, Josephine, discussed the arrest over the telephone at 10 Sable Court with "Roe," stating that Philip had a "quarter" on him and advising "Roe" to "clean up" her house. Following Philip J. Manfredi's arraignment on September 21, Timothy Schrader phoned from the courthouse to Joseph LaCosa at 11 Daisey Court and instructed him to "take the money and put it in a suitcase" and to take "the guns" to his aunt's house "to be safe." On September 23, 1971, at 7:47 p.m., "Frankie" called Joseph LaCosa at 11 Daisey Court and after some preliminary conversation pertaining plainly to Philip's arrest three days before asked him if he had seen his "friend" the other night, by which it may be inferred he meant his connection for narcotics. LaCosa replied that his friend had told him to "go over there tomorrow afternoon." Frankie told him to "let me know . . . . [C]ause ah desperation sitting here." La Cosa did in fact go to his uncle's house the following day, September 24, 1971, and left

it at 6:00 p.m. whereupon he drove back to 11 Daisey Court, Nanuet, his own house. There, at 8:00 p.m. on the evening of the 24th, he received a phone call from appellant "Butch" Yanni who, again after some preliminary talk about Philip's arrest, asked him "if we can do anything." LaCosa replied that he "missed the guy tonight" and that he "just missed him by five minutes." Yanni indicated that he might go to "the guy in the Bronx" (another supplier) but that he didn't want any "hard feelings" on LaCosa's part. Two days later at 8:10 p.m. Yanni again telephoned Joseph LaCosa to find out "what's happening?" and was told to wait until "tomorrow" when he would be seeing "him" (his connection) at "two or three o'clock in the afternoon." The next day, September 27, 1971, Joseph LaCosa left 11 Daisey Court at 1:15 p.m. and drove to Joseph Manfredi's house at 115 Kipp Avenue, where he arrived 45 minutes later. The surveillance agent, White, passed the house and saw Joseph Manfredi standing in the driveway. White then followed LaCosa toward the New Jersey side of the George Washington Bridge, whereupon LaCosa, going 85 to 100 miles per hour, lost the agent, who was only doing 75 to 80. The agent, however, went to LaCosa's residence at 11 Daisey Court and saw him drive a .971 Cadillac back into his garage at 4:30 p.m. Twenty-five minutes later Joseph LaCosa telephoned Yanni and scheduled a meeting for 11:00 p.m. that night. He later telephoned William Marble also to arrange a meeting and shortly after midnight that night the surveilling agents observed a series of half a dozen cars, including the proverbial late-model Cadillacs and Lincolns, enter the LaCosa garage at 11 Daisey Court at ten-minute intervals, each car staying in the garage for five minutes or so and then leaving the area. A jury might assume that they were not arriving for purposes of oil changes or motor repairs.

On September 28, 1971, the following day, at 6:55 p.m. Yanni called Joseph LaCosa and confirmed a meeting at 9:00 p.m. that night and asked if he could get an "extra shirt or two" to which Joseph LaCosa replied, "By tomorrow." At 8:00 p.m. Joseph LaCosa received a call from an unidentified male telling him to wait "if I am a little late." At 8:20 p.m. Yanni called and asked "how long it will be before you get another shirt down." LaCosa replied "the next day or even tomorrow night," whereupon Yanni explained " 'Cause he asked me for four more." They agreed to meet the following night. On September 29 at 9:35 p.m. Yanni telephoned Joseph LaCosa to tell him that he was waiting for "that guy" and invited LaCosa to drop by late that night for the money. LaCosa agreed to meet Yanni the following day and said that "the four shirts" were definite. In the light of the non-wiretap testimony from the Marbles, Byrd and Roseboro, a jury might have assumed that these calls did not have to do with men's furnishings.

Earlier on September 29, LaCosa had called Thaddeus Byrd setting up a meeting for that night and complaining that Byrd's last payment of $20,000 was short by $1,000; LaCosa also called William Marble asking for Horace Marble and arranging for a pickup of $1,300 that night from William.

On September 30, 1971, Agent White followed Joseph LaCosa to Yanni's house in New City, New York, where he arrived at 12:30 a.m., that is, later the night of the 29th; photographs in evidence showed LaCosa entering and leaving the house.

At 8:00 p.m. on October 28, Agent White observed Charles Cassarella enter his residence in Queens. Twenty-five minutes later Cassarella called Philip J. Manfredi at 10 Sable Court to ask Philip whether LaCosa would "do that thing for me or not," complaining that "these guys

keep bothering me every day." Philip's reply was "Don't worry, we'll let you know, all right?"

On November 6, 1971, at 5:40 p.m. Joseph LaCosa placed a telephone call to appellant Anthony Colangelo. Colangelo insisted on a meeting at 7:45 p.m. that evening to deliver a "pair of pants" which is a commonly used narcotics code word for cocaine. LaCosa agreed and Colangelo told him to bring the price of one pair of pants.

C. *Additional evidence.* On March 14, 1972, searches were conducted pursuant to warrants at the LaCosa home at 11 Daisey Court, the Manfredi-Schrader home at 10 Sable Court, and the Yanni home at New City, New York. Much additional evidence was obtained. This evidence included slips of paper bearing references to the defendants on trial and substantial numerical figures identified by Horace Marble as similar to bills of account he received from Joseph LaCosa; an address book bearing names and telephone numbers of the conspirators Grant, Marble, Mayo and Byrd at the home of the Schraders; $39,764 in cash in Timothy Schrader's bedroom; and other miscellaneous items. Three days later, with the use of the address book, Agent Siegel called various telephone numbers found in it. One was that of Herman Grant with whom Siegel as "Joey LaCosa's cousin Dominick" arranged to deliver a "couple of shirts." In return for the "shirts" he received $18,000, following which Grant was arrested. Agent Siegel also called Anthony Colangelo with the use of the LaCosa address book with the same story. Colangelo asked the price, to which Siegel replied $12,000. Colangelo said he wasn't sure and didn't know whether he would take them. At that point a telephone next to Siegel rang loudly in the BNDD headquarters. Colangelo stated that he didn't know anyone by the name of Joey LaCosa and that Siegel must have the wrong party and hung up. Siegel also called Robert Mayo with the same story. Mayo "agreed to take

them," that is to say, the shirts, and Mayo said he didn't owe LaCosa any money and that they should meet at the "usual place" which he defined as 126th Street and Fifth Avenue. Mayo did not show up, so Siegel telephoned him again and Mayo subsequently said he couldn't handle the shirts.

On April 30, 1972, Agent White arrested Joseph Manfredi and, after proper warnings, on the way to New York Manfredi stated to White that he thought that the Bureau of Narcotics was going to place him under arrest at the time that Philip J. Manfredi had been arrested in September, 1971. In addition a summary of telephone records was stipulated into evidence which indicated among other things that in the first four months of 1971 there were 64 calls from the Daisey Court telephone to a telephone in the name of Diane Marble, that is to say, her husband, Horace, and in 11 days' time in August and September of 1971, 12 calls from that number to Robert Mayo, four calls from the Nanuet number to Tony Colangelo between November 8, 1971, and November 11, 1971, and 40 calls from Anthony Colangelo to the Nanuet number between October 29, 1971, and November 8, 1971.

II. Sufficiency of the Evidence

A. *Joseph LaCosa.* There was ample evidence in the testimony of Horace and William Marble, Robert Roseboro and Thaddeus Byrd, independent of the wiretaps, to show that Joseph LaCosa was selling heroin and cocaine in a continuing series of weekly transactions with several distributors, the primary product pushed being heroin. To Horace Marble alone he sold an estimated one million dollars' worth in 17 months.

B. *Joseph Manfredi.* There was sufficient circumstantial evidence independent of hearsay declarations from which Manfredi's participation in the conspiracy could be in-

ferred. In *United States* v. *Calabro*, 449 F.2d 885, 889-90 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972), presence of the defendant with a codefendant when the codefendant was engaged in a criminal enterprise, coupled with the defendant's "patting down" an undercover agent, was held to be sufficient independent evidence to permit an inference of the defendant's having associated himself with the criminal venture. *See also United States* v. *Geaney*, 417 F.2d 1116, 1120-21 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). This independent evidence may be completely circumstantial. *Cf. United States* v. *Cassino*, 467 F.2d 610, 618 n.21 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). By actual surveillance Joseph LaCosa was seen to try to meet his uncle at the times he told his customers he was going to meet his "friend." After he did meet his uncle on one occasion he eluded Agent White on the return to his home and that same night there was a series of visits to his garage that can fairly be described as clandestine. The calls by Joseph LaCosa to his distributors do not implicate Manfredi as such, but they do shed light on LaCosa's conduct which in turn is circumstantial proof that Manfredi was supplying him with heroin. *See United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States* v. *Pacelli*, 470 F.2d 67, 69-70 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *United States* v. *Calabro, supra*. There was, then, sufficient independent evidence to establish Manfredi's participation in the conspiracy to warrant introduction of hearsay statements against him. *Glasser* v. *United States*, 315 U.S. 60, 74 (1942). These statements by Joseph LaCosa to Horace Marble and Robert Roseboro, recounted in the recital of facts above, established Manfredi as the supplier of heroin to LaCosa, thereby confirming the circumstantial evidence related above. They were made in the

furtherance of the conspiracy, since LaCosa was obviously trying to impress his customers with the importance, connections, wealth and power of his uncle in order to build sound "customer relations." They have a ring of reliability for this very reason. There is no requirement that the trial judge must find, before admitting a coconspirator's declaration, that it is neither "crucial" to the Government's case nor "devastating" to the defense. *United States* v. *Puco*, 476 F.2d 1099, *on petition for rehearing*, 476 F.2d 1106, 1107 (2d Cir. 1973). Even if there were such a requirement, the hearsay declarations here were neither more "crucial" nor more "devastating" than the declarations in *Puco* itself. *United States* v. *Puco*, 476 F.2d at 1103-05.

C. *Frank LaCosa, Timothy Schrader, Charles Cassarella and Robert Mayo.* Appellants Yanni and Colangelo do not contest the sufficiency of the evidence against them. Frank LaCosa's house was used for the operation of the narcotics business, his garage was used as a delivery point, his Lincoln was used by his son Joseph for deliveries; more importantly perhaps his telephone conversation with "Benny" on September 17, 1971, implicates him clearly—he could deliver the "stuff" the day following receipt of the money or if it's early enough in the day "you can have it the same night . . . this way they don't think that they're getting cheated." Shrader's house, telephone and cars were used by Joseph LaCosa and Philip J. Manfredi to arrange narcotics transactions and handle deliveries; his telephone call from the courthouse and treasure trove of nearly $40,000 in cash permit the inference of participation and reward in the conspiracy. Cassarella's calls were more guarded, perhaps, even than the others, but were in "narcotics code," requesting "double" what he got "the last time," inquiring whether Joey was "going to do that for

me or not," and in an obvious reference to his own customers, complaining that "these guys keep bothering me every day." Robert Mayo, who was in Joseph LaCosa's address book, was a customer of the ring; Mayo was willing to do business with Agent Siegel masquerading on the telephone as "Joey's cousin Dominick," the business being the taking of "a couple of shirts" and at the "usual place"; that he had done a considerable amount of business was indicated by the numerous calls from 11 Daisey Court to Mayo at the end of August, 1971.

III. The Wiretap Questions

We omit reference to the question of constitutionality of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, since *United States* v. *Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 42 U.S.L.W. 3181 (U.S. Oct. 9, 1973), and *United States* v. *Bynum*, *supra*, slip op. at 5309, have dealt with that issue adversely to appellants, noting that the very issue is before the Supreme Court in *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 411 U.S. 905 (1973).

The principal attacks made on the wiretapping here are (1) an omission in both the original and renewal warrant orders to require "minimization" under state law, CPL § 700.30, and (2) an alleged failure to minimize the interception of innocent conversation on the two telephones tapped, contrary to state law, CPL § 700.30, and federal law, 18 U.S.C. § 2518(5).[6]

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6 Under § 700.30 of the CPL, the warrant must contain:

1. The name of the applicant, date of issuance, and the subscription and title of the issuing justice; and

2. The identity of the person, if known, whose communications are to be intercepted; and

3. The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; and

In dealing with the question of the validity of the warrants themselves, clearly a question of state law,[7] it will be recalled that the Crodelle affidavit submitted to the state

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4. A particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which it relates; and

5. The identity of the law enforcement agency authorized to intercept the communications; and

6. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained; and

7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; and

8. An express authorization to make secret entry upon a private place or premises to install an eavesdropping device, if such entry is necessary to execute the warrant.

18 U.S.C. § 2518(5) reads in pertinent part as follows:

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . .

7 While we encourage cooperation between federal and state law enforcement agencies, we note that the Government, in allowing a joint investigation to proceed through the use of a state warrant, subjects itself to the risk that state courts may impose on such warrants and the evidence obtained under those warrants a higher standard than would a federal court dealing with interpretation of the federal wiretap statutes. *Cf. California* v. *Jones*, 30 Cal. App. 3d 852, *appeal dismissed*, 42 U.S.L.W. 3175 (U.S. Oct. 9, 1973).

court judge in support of the petition seeking the wiretap order contained an agreement "to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations."

Neither the original nor renewal warrant orders, however, contained any directive to this effect. CPL § 700.30 specifically says that "An eavesdropping warrant must contain: . . . 7. A provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article. . . ." New York state judges have construed this requirement in different ways, Justice McGrover in *People* v. *Solomon*, 346 N.Y.S.2d 938, 941 (Sup. Ct. 1973), holding that omission of that specific directive was "nothing more than a 'de minimis' oversight," which would not vitiate an eavesdropping order, while Judge Werken in *People* v. *Kennedy*, 347 N.Y.S.2d 327 (Greene Cty. Ct. 1973), held a wiretap order fatally defective for failure to comply with the 700.30 requirement. *Compare People* v. *Sher*, 329 N.Y.S.2d 2 (Greene Cty. Ct. 1972), *with People* v. *Heuston*, 347 N.Y.S.2d 78 (App. Div. 1973) (3-2 decision) (re notice), *and People* v. *Palozzi*, 346 N.Y.S.2d 595 (Monroe Cty. Ct. 1973). No New York case, however, involves reliance in the order upon supporting affidavits which contain an agreement to "minimize." In this case we feel free to analogize from *United States* v. *Tortorello*, 480 F.2d at 781, which, while it apparently did not consider the matter as controlled by state law, held that a New York state judge's authorization order was sufficient to establish probable cause on the basis of facts alleged in the supporting affidavits. We feel it proper to read both the orders themselves and the minimization language of the supporting affidavits in "a commonsense and realistic fashion." *See United States* v. *Ventresca*, 380 U.S. 102, 108 (1965) (probable cause); *United States* v. *Desist*,

384 F.2d 889 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969). We read CPL 700.30(7) also as a summation of the more specific requirements of 700.30(1)-(6), all of which lead to "minimization." So reading the state statute and the orders and affidavits, we do not find the orders vitiated by virtue of omission of the talismanic minimization language.

We turn now to the more difficult question whether, in this case, the eavesdropping was conducted so "as to minimize the interception of communications not otherwise subject to eavesdropping" under CPL § 700.30(7). This question is, like that of the facial validity of the warrant, one to be determined by reference to state law. Assessment of the minimization question necessarily ultimately depends upon the facts and circumstances of each case.

As previously stated, *see* text following note 4 *supra*, all calls incoming or outgoing over the two telephones involved were monitored and recorded irrespective of the identity of the parties engaged in the conversations. After the transcription of the conversations was accomplished in either summary or verbatim fashion, the tapes themselves were kept under lock and key. The court has examined both the monitor logs and the transcription sheets with some care in order to appreciate more fully the claims made by both the defendants and the Government with respect to minimization.

Our examination of state court decisions construing and applying CPL § 700.30(7) leads us to conclude that none of them is either dispositive or particularly indicative of how the New York courts would rule on the facts before us. The New York Court of Appeals has yet to consider this question. In *People* v. *Holder*, 331 N.Y.S 2d at 569-71, the two defendants were under indictment for conspiracy to cause the felonious death of a third party. In this quite simple conspiracy, the fact that fewer than 10

per cent of the conversations recorded were relevant to the conspiracy appears to have been determinative of the court's decision to suppress. In *People* v. *Castania,* 340 N.Y.S.2d 829, 833-36 (Monroe Cty. Ct. 1973), the court was faced with a gambling conspiracy more complex than the conspiracy in *Holder* but which cannot be equated with the conspiracy before this court. In *Castania* the court took account of the fact that only slightly over one-half of the conversations had been monitored, which, coupled with the court's assumption that non-pertinent calls could have been recognized as such and not intercepted, dictated a finding that minimization had not been achieved. It is precisely that assumption made by the *Castania* court which cannot be made in this case. In *People* v. *Kennedy,* defendants were under indictment for *possession* of dangerous drugs and associated paraphernalia. The court, in dicta, indicated its disapproval of a practice under which only 10 per cent of the calls recorded were actually monitored, thereby virtually negating the possibility of minimizing the interception of calls.

These state cases, since they do not deal with complex, far-flung narcotics conspiracies, are not dispositive of the case before us. We feel free, in these circumstances, to consider the question of minimization under the language of 18 U.S.C. § 2518(5) and decisions thereunder, noting that the language of CPL § 700.30(7) virtually tracks that of the federal statute. We also note that in considering the question of minimization, the *Holder* court, 331 N.Y.S. 2d at 571, and the *Castania* court, 340 N.Y.S.2d at 836, both appear to incorporate by reference lower federal court decisions addressed to this question.

We are aided by the trial court's finding that the law enforcement agents here made a "good faith effort to minimize to the extent practical and electronically possible,

within the peculiar circumstances of a narcotics conspiracy —which is one of the most difficult things to surveil and obtain evidence on that I can think of in modern law enforcement . . . ." We held in *Bynum*, slip op. at 5310, that "the mere fact that every conversation is monitored does not necessarily render the surveillance violative of the minimization requirement of the statute." What Judge Tyler was talking about here was doubtless that in a narcotics conspiracy the use of code words and cover-up jargon and methods of dealing make investigation most difficult. Here, as in *Bynum*, "it is . . . obvious that no electronic surveillance can be so conducted that innocent conversation can be totally eliminated." *Id.* at 5310. Here there was testimony that "most" of the 1,595 calls intercepted were deemed to be "germane" to the narcotics investigation. In all candor, our examination of the logs and transcription sheets does not lend credit to that testimony.[8] At the same time, here, as in *Bynum*, the conspiracy unveiled was a huge business involving millions of dollars' worth of narcotics, numerous distributors and highly complex, surreptitious telephone calls, with numerous callers, male and female, both in and out of the surveilled homes, occupied by persons at least one of who was openly claiming to be connected with organized crime in the operation of the business. We too fail to see how any detailed screening instructions which could effectively minimize licit telephone interceptions could be devised under these circumstances. Here no claim is made that the Government could have formulated a pattern of innocent calls by which it could have

8 For example, the court's examination of the Sable court transcript sheets revealed that over 800 of the more than 1,000 calls placed during the period in question were either designated as "non-pertinent" by the transcriber(s) or were calls to which there was either no answer or a busy signal. Only 150 or so calls were designated to be of possible interest.

avoided intercepting those. Here no claim is made that any privileged calls were intercepted.[9]

Calls dealing with the narcotics conspiracy were made at all hours of the day or night, so that no minimization by non-use in certain time periods could be attempted. In the sampling of about 100 calls listened to by Agent White, he heard "very few"—indeed he did not remember hearing any—that did not relate to drugs or the proceeds obtained from drugs. Morover, it is perfectly clear from the record that some seemingly innocuous calls were in fact related to the drug conspiracy; evidentiary significance could be ascertained only by comparison with other conversations involving the same persons or in the light of facts ascertained either independent of or as a result of the conversation. Finally, it was obvious that the purpose of the wiretaps was not simply to obtain evidence against the telephone subscribers but rather to ascertain the scope and extent of the drug conspiracy under investigation. Given all these facts, we believe that the Government made a prima facie showing of compliance with the minimization provision, and we have the trial court's finding of good faith, in monitoring all the calls from the two key numbers.

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9 Section 2510(4) defines "intercept" to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device." Section 2518(8)(a) requires that "[t]he contents of any wire or oral communication intercepted . . . shall, if possible, be recorded on tape or wire or other comparable device." The recordings in turn must be kept under seal until authorized to be opened by court order. In this case, all conversations recorded were also monitored, so, as in *Bynum*, slip op. at 5314 & n.6, we need not reach the question whether the statute was intended to apply solely either to aural intrusion or mechanical recordation. Indeed, were all the calls not recorded, ingenious counsel might be claiming that exculpatory conversations or conversations that would place seemingly inculpatory conversations in context were omitted and *Brady* v. *Maryland* would be invoked. We also see no reason why, upon proper application by affected parties, subject to order of the court to which returns on the authorizing warrants were made, so-called "non-pertinent" calls could not be erased from the tapes.

While it may be that, as Judge Miller said in *United States* v. *Focarile,* 340 F. Supp. 1033, 1047 (D. Md. 1972), *aff'd sub nom. United States* v. *Giordano, supra,* "[s]ection 2518(5) ... requires the intercept procedure to be conducted so as to reduce to the smallest possible number the interception of 'innocent' calls," in this instance the burden clearly shifted to the defendants to make some showing as to how this could be done. They make no suggestion even now. Here, as in *Bynum,* there was no way to frame screening instructions so as to accomplish any non-recording of "innocent" calls. Indeed, were all the calls not monitored, ingenious counsel would be claiming that exculpatory conversations or those which would place other conversations in context were omitted and *Brady* v. *Maryland* would be invoked. We do not believe that the statute goes further than to require that the methods used to effect minimization be in good faith and reasonable. *Cf. Berger* v. *New York,* 388 U.S. 41, 53 (1967), and *Katz* v. *United States,* 389 U.S. 347, 355 (1967). It thus becomes unnecessary for us to determine whether a failure adequately to minimize requires suppression of all the conversations overheard, *United States* v. *Focarile,* 340 F. Supp. at 1047; *United States* v. *Scott,* 331 F. Supp. 233 (D.D.C. 1971), or only nonincriminating conversations. *United States* v. *Cox,* 462 F.2d 1293, 1301-02 (8th Cir. 1972); *United States* v. *King,* 355 F. Supp. 523, 543-44 (S.D. Cal. 1971).

We see no reason why, upon proper application by affected parties, subject to order of the court to which returns on the authorizing warrants were made, so-called "non-pertinent" calls could not be erased from the tapes.

While appellants do not challenge the wiretaps on the basis of lack of probable cause, certain appellants argue that the application for the wiretap orders must be made by the district attorney in person appearing before the judge. While under CPL § 700.05(5) the "applicant" has

to be a district attorney or the attorney general, and under 18 U.S.C. § 2516(2) the applicant must be the "principal prosecuting attorney" of any state or political subdivision thereof, this court held in *United States* v. *Tortorello, supra,* that the requirement of former § 794 of the CPL (now § 690.35, omitting the very language discussed in *Tortorello*) that "[t]he person seeking the warrant shall appear personally before the judge . . ." related only to the law enforcement officers with personal knowledge who signed the supporting affidavits. Not only does *Tortorello* seem to us to make good sense, but the appellants fail to point to any language in the New York statutes in effect at the time of the issuance of the warrants here that would require any such personal appearance even of the law enforcement officers.

The argument that only the district attorney's staff and the state police were authorized to monitor the wiretaps, but in fact federal narcotics agents did so, thus subjecting the wiretaps to attack under 18 U.S.C. § 2518(10)(a)(iii), is without substance. This was at all times a joint investigation, as found by Judge Tyler, and the Rockland County District Attorney specifically relied on BNDD Agent White's affidavit in his application for the original authorizing warrant. It is beyond dispute that, whether decided as a matter of federal or state law, both statutory schemes specifically allow for the disclosure of evidence gained from an authorized wiretap by those authorized to appropriate law enforcement officials not mentioned in the wiretap order. The federal provision, 18 U.S.C. § 2517, and the New York state provision, CPL 700.65, both contemplate the type of cooperation among law enforcement officials which occurred in this case. *See United States* v. *Forlano,* 358 F. Supp. 56, 59 (S.D.N.Y. 1973). If such information may be exchanged after the termination of the surveil-

lance, we perceive no reason why that information may not be disclosed to cooperating agencies contemporaneously with its interception.

Finally, appellants argue that the postponement of notice of the surveillance to those persons named in the warrants until on or about June 3, 1972, some six months after the termination of the surveillance, was violative of 18 U.S.C. § 2518(8)(d) and CPL § 700.50(3), (4). No state cases having been brought to our attention on this point, we think that the proper perspective for viewing this question is correctly stated by the Third Circuit:

> If, in a given case, there is undue delay [in giving notice], that contention may be pressed in an appropriate averment alleging non-compliance with the statute. The vice of unreasonable delay is a factor to be measured within the contours of the statute, and should not be used to shape those contours into an unconstitutional form. Simply stated, the Congressional mandate places a premium on reasonable notice of the inventory. . . . [C]ourts should exercise great care in granting extensions beyond the ninety-day period for the filing of inventories.

United States v. *Cafero*, 473 F.2d 489, 500, *petition for cert. filed*, 42 U.S.L.W. 3018 (U.S. Mar. 26, 1973) (No. 72-1304). Given the complexity of the investigation that continued up until the moment that notice was given in this case, we are extremely reluctant to disturb Judge Tyler's determination below that the postponement authorized by Justice Sweeney was reasonable under all the circumstances. It may be that this holding stretches the interpretation of the statutory provisions to constitutional limits, but if so, we note that none of the appellants have made or attempted to make any showing of prejudice to them as a result of the delay here.

IV. Constitutionality of 21 U.S.C. § 848

Appellant Joseph LaCosa's conviction under Count II of the indictment was for "engaging in a continuing criminal enterprise" under 21 U.S.C. § 848(b),[10] and resulted in a 30-year sentence and $100,000 fine thereunder. He argues that the statute is void for vagueness. *See, e.g., Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939) (disorderly person); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972) (vagrancy). While it may be true, as the Government argues, that only very infrequently has a *federal* statute been declared unconstitutional on vagueness grounds, *e.g., United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81 (1921), this does not answer the basic question whether 21 U.S.C. § 848(b) is constitutionally vague. As Mr. Justice Douglas noted in *Papachristou,* however,

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10 21 U.S.C. § 848:

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

. . . .

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

. . . .

"In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." 405 U.S. at 162. In this respect § 848 is in a very real sense a regulation—a very severe one, to be sure—of the business of selling drugs. To constitute a "continuing criminal enterprise" there must be a felonious violation of the chapter which is a part of a "continuing series of violations" of Title II or Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513 (Oct. 27, 1970), 84 Stat. 1242, 21 U.S.C. § 801 *et seq.* & 951 *et seq.* In addition, the violator must have been acting "in concert with five or more persons" and as to them occupy "a position of organizer, a supervisory position, or any other position of management." Beyond this the violator, or person charged under § 848, must obtain "substantial income or resources" from the enterprise. Section 848 then goes to the business of trafficking in the prohibited drugs on a continuing, serious, widespread, supervisory and substantial basis. The conduct reached is only that which the violator knows is wrongful and contrary to law. *See Screws* v. *United States*, 325 U.S. 91, 102 (1945) ("But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law"). Prerequisite to conviction under § 848 is the commission of a series of felonies, each involving specific intent; that LaCosa did not suspect that his conduct was criminal and violative of law would be risible. *See also United States* v. *Ragen*, 314 U.S. 513, 524 (1942) (income tax evasion—element of bad faith avoids indefiniteness question in deducting of more than "reasonable" allowances for salaries). *Cf. Hygrade Provision Co.* v. *Sherman*,

266 U.S. 497 (1925); *Omaechevarria* v. *Idaho*, 246 U.S. 343 (1918).

There is no doubt whatsoever that LaCosa was charged and tried for conducting what must be one of the biggest operations in hard drugs in the New York area; here, as in *Williams* v. *United States*, 341 U.S. 97, 104 (1951), it "strains at technicalities to say that any issue of vagueness . . . as construed and applied is present in the case." *See also United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). That is to say, it is irrelevant that a case may be hypothesized where it is difficult to determine whether a particular defendant were engaged in a "continuing criminal enterprise" under § 848. This serves to distinguish this case from cases like *United States* v. *Singleton*, 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973), in which a statute penalizing "organized criminal activity" without further definition was, despite doubts from the dissenter, upheld. Here, as in *Petrillo*, the statute might have been more artfully drawn, but no language has occurred or has been suggested to us that better expresses the congressional purpose. To sustain appellant LaCosa's position would force us to hold that words cannot be devised to make it an offense to engage in the continuous sale and trafficking in heroin with a number of other people and with substantial sums of money changing hands; we feel that not to be the case and that, as applied to the conduct with which Joseph LaCosa was charged, *see Broadrick* v. *Oklahoma*, —— U.S. —— (1973), the statute is not unconstitutionally vague. *United States* v. *Collier*, 358 F. Supp. 1351 (E.D. Mich. 1973).

V. Pretrial Publicity

Approximately two weeks prior to the commencement of this trial, two nephews of Joseph Manfredi—Philip J. Man-

fredi, who had previously been charged in the indictment under which this case was brought, and Philip D. Manfredi —were executed in a vacant lot in Bronx County. The various media gave these executions extensive coverage. In the headlines of several New York newspapers 10 to 12 days *before* the trial there appeared such items as "Two Hoods Killed; Fear Drug War" and "Six Drug Dealers Vanish, Gang War, Six Drug Dealers Missing." There also appeared references to appellant Joseph Manfredi as a member of "organized crime" and a caption under a photo "Two Nephews Bumped Off; Cops Think Maybe Fight for Drug Business." Apparently television referred to a "$25 million narcotics ring." The trial court refused to grant a continuance and conducted a voir dire, inquiring of the jurors whether they had heard either on the radio or television or read any newspaper or printed account of "anything having to do with this case." Only one of the jurors replied affirmatively, but she could not recall what she read; one other juror thought he might have read something, but wasn't sure. The appellants argue that reference to Philip J. Manfredi's name, coupled with his absence from the trial and references to certain locations in the Bronx, "very likely supplied the catalyst for association by jurors" with what had been earlier disseminated by the media. It is the failure of the trial court to grant a continuance in view of the pre-trial publicity that is said to constitute prejudicial error, and it is argued that this case is one of such extreme "inherently prejudicial publicity" that the actual existence of prejudice in the jury box need not be shown. *Cf. Hale* v. *United States*, 435 F.2d 737, 746 (5th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971).

But the publicity here did not deal with the issue of guilt or innocence in the case itself. *United States* v. *Persico*, 425 F.2d 1375, 1380 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States ex rel. Gallo* v. *New York State*

Department of Correctional Services, 335 F. Supp. 915, 918 (S.D.N.Y. 1972). Moreover, the voir dire—which seems to have been conducted fairly—disclosed no recall of the 10-day-old stories. *See United States* v. *Dioguardi,* 428 F.2d 1033, 1039 (2 Cir.), *cert. denied,* 400 U.S. 825 (1970); *United States* v. *Agueci,* 310 F.2d 817 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963); *United States ex rel. Gallo* v. *New York State Department of Correctional Services, supra.* In times of fast-moving news events of all kinds one really cannot be surprised at what appears to be a short memory on the part of the public generally or the cross-section of it included on a given jury panel. Appellants' sense of their own importance in their analogizing this case to the Watergate is greater than this court's. We do not believe, in short, that the trial court's "broad discretion," *United States* v. *Persico,* 425 F.2d at 1382, in this area of prejudice from pretrial publicity was here abused by the denial of the continuance. We point out that this is not a case of *in-trial* publicity like *Marshall* v. *United States,* 360 U.S. 310 (1959), or *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). *See also United States* v. *Palmieri,* 456 F.2d 9, 13-14 (2d Cir.), *cert. denied,* 406 U.S. 945 (1972).

Judgment affirmed.